Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-749

IN THE

Supreme Court of the United States

October Term, 1982

PETER F. K. BARABAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NATHAN LEWIN
(*Counsel of Record*)
R. STAN MORTENSON
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Counsel for Petitioner

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTIONS PRESENTED

1. Whether a prosecutor's summation which makes several indirect references to a defendant's failure to testify at his trial can be overlooked on appeal as "harmless error."

2. Whether the prosecution has met its burden of proof in a "net worth" tax-evasion case if it introduces no evidence to negate (a) the existence of a large personal loan, which was reflected on a net-worth statement of the defendant, or (b) the availability to the defendant of large amounts of cash entrusted to him by others.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page

Carlin v. United States,
351 F.2d 618 (5th Cir. 1965) 8

Griffin v. California,
380 U.S. 609 (1965) 6

Holland v. United States
348 U.S. 121 (1951) 9

United States v. Bates,
512 F.2d 56 (5th Cir. 1975) 8

United States v. Bethea,
537 F.2d 1187 (4th Cir. 1976) 9

United States v. Dorr,
636 F.2d 117 (5th Cir. 1981) 5, 8

United States v. Flannery,
451 F.2d 880 (1st Cir. 1971) 8

Cases: **Page**

United States v. Grasso,
629 F.2d 805 (2d Cir. 1980) 9

United States v. Hasting,
No. 81-1463 ..... 6, 10

United States v. Massei,
355 U.S. 595 (1958) 9

United States v. Rodriguez,
627 F.2d 110 (7th Cir. 1980) 8

Statutes

26 U.S.C. § 7201 2

28 U.S.C. § 1254(1) 1

IN THE

Supreme Court of the United States

October Term, 1982

No.

PETER F. K. BARABAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The decision of the court of appeals (Pet. App. A, p. 1a, *infra*), summarily affirming the petitioner's conviction is not reported.

JURISDICTION

The decision of the court of appeals was issued on December 1, 1981. Petitioner filed a timely petition for rehearing which was denied on August 30, 1982 (Pet. App. B., pp. 2a-3a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner was convicted after a trial by jury on three counts of tax evasion (26 U.S.C. § 7201) involving the years 1975, 1976 and 1977, and was sentenced to consecutive three-year terms of imprisonment on Counts 2 and 3, and to a five-year period of probation, to begin at the conclusion of his imprisonment, on Count 1. The court of appeals affirmed the conviction after oral argument without a written opinion.

The prosecution's case was based on the "net-worth" method of proof. Evidence was introduced that during the three tax years petitioner had spent sums exceeding his reported net income in purchasing a home in Palm Beach, furniture and art for that home, expensive automobiles, other real estate, and jewelry. Petitioner's accountant testified that petitioner had told him that he had obtained a $1.2 million interest-free loan from a private source, and that loan had been reflected on a personal financial statement prepared by the accountant in connection with a business transaction. No specific evidence refuting the existence of that loan was presented by the prosecution, and the prosecution omitted the loan from the computation provided to the jury by the prosecution's expert witness. Other evidence introduced during the prosecution's case established that petitioner, who was a lawyer specializing in criminal defense work, received large cash retainers from his clients, which were deposited into his personal bank account.[1]

---

[1]The prosecution also introduced testimony from several witnesses that petitioner's checks to them for goods and services had "bounced." On appeal, the prosecution maintained that in each instance, this highly prejudicial testimony was relevant to some factual issue at trial and that its admission, even if erroneous, was "innocuous."

The defense moved for a judgment of acquittal at the conclusion of the prosecution's case and rested without offering any proof whatever. The theory of the defense at trial was that the prosecution had failed to establish a reasonably certain opening net worth. On appeal the defense also contended that the prosecution had failed to satisfy the burden of proof imposed by this Court's decisions for "net worth" tax evasion cases because it had neglected investigatory leads concerning the $1.2 million loan and the large sums of cash entrusted to petitioner by his clients.

At the conclusion of his summation, the prosecutor told the jury that it might have some "questions" for petitioner's counsel, Mr. Culverhouse (Tr. 1036-1039):

> I don't know what additional questions you might have of me. I have tried to answer some of them or all of them that have occurred to me, and I don't know what questions you might have for Mr. Culverhouse.
>
> But I have a few that I think you might want to ask and I think that he should answer
>
> First: Is there any dispute about the amounts of money that Peter Baraban spent and the increases in his net worth for 1975, 1976 and 1977?
>
> Second: Is there any real dispute about Mr. Baraban's opening net worth as of December 31, 1974?
>
> If there is no question about that, or even if there is, I would imagine that you would ask Mr. Culverhouse what conceivable purpose is there in this record consistent with any reasonable explanation of Mr. Baraban's innocence, except to conceal the source of money.

What conceivable purpose was there for funneling the money into 950 South Miami Avenue Associates through Am-Vest, a corporation not even chartered in the State of Florida.

What explanation is there in this record? Is Mr. Culverhouse going to ask you to believe that Peter Baraban really had a 1.2 million dollar loan?

What proof is there in this record of that loan, except Peter Baraban's self-serving statements that were made to Mr. Levi and the inclusion on the financial statement that was given to Mr. Van Landingham of the 1.2 million as a liability, a financial statement which nevertheless reflects a positive net worth of $858,000.

What reasonable explanation consistent with Mr. Baraban's innocence, based on the facts and evidence in this case, can Mr. Culverhouse give you for Mr. Baraban's failure to deposit all his fees in bank accounts?

If all of the moneys that Mr. Baraban expended in 1975, 1976 and 1977, and particularly the so-called 1.2 million dollar loan, if these were loans or from nontaxable sources, why were they not put into bank accounts, if not to conceal sums of money that Mr. Baraban was receiving?

Does Mr. Culverhouse question it all that 550 South Ocean Boulevard was really Mr. Baraban's house, that he had bought, renovated and landscaped with his own money, with the intention of living there?

And finally, is not the only reasonable inference to be drawn from the concealing of these moneys, that of a guilty mind? We submit that

> the evidence in this case shows that Mr. Baraban evaded his taxes, attempted to evade his taxes for the years 1975, 1976 and 1977.
>
> And that the evidence compels that conclusion beyond any reasonable doubt.
>
> Thank you.

Defense counsel then asked that the jury be excused and objected to the prosecutor's summation on the following ground, *inter alia* (Tr. 1039-1040):

> Second, I think the questions at the end put an inference that my client must come forth with some evidence and I would make a motion for a mistrial based on that.

The district judge denied the motion for mistrial. On appeal, petitioner contended that the prosecutor's references in summation constituted reversible error. The prosecution's response in its "Summary of Argument" in the appellate court was (1) that the remarks were "proper" and "were designed to focus defense counsel and the jury upon the reasonable inferences to be drawn from the evidence" and (2) that "even if the remarks were improper, no substantial right of Baraban was prejudicially affected." Brief for the United States, Fifth Circuit, No. 81-5144 at 24. For the second argument, the government relied principally on the Fifth Circuit's decision in *United States v. Dorr*, 636 F.2d 117 (5th Cir. 1981), which turned on whether a prosecutor's statement in summation had been "harmless error." 636 F.2d at 121. The argument was also elaborated in the body of the brief. Brief for the United States at 49. The court of appeals affirmed the conviction without opinion.

REASONS FOR GRANTING THE WRIT

1. The principal issue presented by this petition is now before this Court in a case that has been fully briefed and will shortly be argued – *United States v. Hasting*,[2] No. 81-1463. The *Hasting* case will probably resolve two questions that bear upon proper disposition of petitioner's conviction:

(a) Whether an indirect reference by a prosecutor to a defendant's failure to testify violates the Fifth Amendment's protection against self-incrimination as applied in *Griffin v. California*, 380 U.S. 609 (1965).

(b) Whether the "harmless error" rule applies to a trial in which the prosecutor violates the defendant's constitutional right with an impermissible indirect reference to the defendant's failure to testify.

By affirming petitioner's conviction without writing any opinion, the court of appeals failed to specify on what principle of law it relied in rejecting petitioner's challenge to his conviction. If this Court were to determine in the *Hasting* case that an indirect reference to a defendant's failure to testify is permissible, there would, of course, be no reason to have any further proceedings concerning that issue on this case. If, however, this Court agrees in *Hasting* with the principle applied by various federal courts that such an indirect reference does violate the constitutional principle of *Griffin v. California*, 380 U.S. 609 (1965), the question in this case – as in *Hasting* – will be

---

[2]Although the case was titled *United States v. Hastings* at the time of the filing of the petition for a writ of certiorari, subsequent briefs indicate that the lead respondent's name is spelled without an "s." We have reproduced the decision of the Seventh Circuit in the *Hasting* case as Pet. App. C, pp. 4a-8a, *infra*.

whether the violation may be ignored if it constitutes "harmless error."

No matter how the Court resolves that legal issue in *Hasting*, it would be necessary to vacate the decision below in this case and to remand the case to the court of appeals for it to decide in the first instance whether or not the error was harmless. At present, there is no way of knowing whether the court below agreed with the prosecutor's initial argument that the indirect references were permissible or with his alternative argument that even if the remarks were improper they were harmless. Following the *Hasting* decision, the outcome of petitioner's appeal is likely to hinge on precisely that clarification.

(a) The impropriety of the prosecutor's several indirect references to the petitioner's failure to testify cannot, we submit, be seriously contested. If one substitutes the words "Mr. Baraban" for the prosecutor's various references to "Mr. Culverhouse" – who was petitioner's trial counsel and therefore his *alter ego* in the mind of the jury – the pointedness of the prosecutor's purportedly "rhetorical" questions becomes entirely clear. In each of the four instances,[3] the prosecutor was asking what ex-

[3]The prosecutor asked (1) what "explanation is there in this record" for "funneling" a loan for purchasing a building through a non-Florida corporation, (2) "what proof is there in this record" of the $1.2 million loan, (3) "what reasonable explanation consistent with Mr. Baraban's innocence, based on the facts and evidence in this case" could petitioner's counsel give for the failure to deposit fees in bank accounts, and (4) whether "Mr. Culverhouse question[s] it all" that a building purchased by petitioner "was really Mr. Baraban's house" pp. 3-5, *supra*). None of these questions could be answered, of his own personal knowledge, by petitioner's attorney. The questions were plainly and necessarily directed to petitioner personally, and they inevitably focussed the jury's attention on petitioner's failure to take the stand.

planation the petitioner could offer to rebut a particular inculpatory inference – a question that the jury would naturally and necessarily construe as commenting on petitioner's silence at trial. The prohibition against such a reference cannot be avoided by the stratagem of substituting the name of trial counsel – who is a defendant's *alter ego* in the courtroom – for the identification of the defendant himself.

The repeated indirect references in this prosecutorial summation were more clear violations of the petitioner's constitutional right not to testify than were fleeting references made by prosecutors in cases from other circuits where convictions were reversed. *Compare, e.g., United States v. Flannery,* 451 F.2d 880 (1st Cir. 1971) (prosecution testimony is "uncontradicted"); *United States v. Rodriguez,* 627 F.2d 110 (7th Cir. 1980), and authorities cited therein (references to defendant as "very quiet"). Indeed, earlier Fifth Circuit cases indicate that the language used here by the prosecutor crossed the line separating permissible comment from a violation of the defendant's constitutional right. *Compare, e.g., Carlin v. United States,* 351 F.2d 618 (5th Cir. 1965); *United States v. Bates,* 512 F.2d 56 (5th Cir. 1975).

(b) The court of appeals may have agreed with the above legal propositions as applied to this case but nonetheless affirmed petitioner's conviction because it concluded that the error was harmless. In its brief in the court of appeals, the government relied on *United States v. Dorr,* 636 F.2d 117 (5th Cir. 1981) – a leading Fifth Circuit precedent reviewing the concept of "harmless error" as applied to prosecutorial misconduct in summation. That case was cited not only in the body of the government's brief (Brief for the United States, Fifth Cir., No. 81-5144 at 49), but was the *only* authority cited for this

proposition in the "Summary of Argument." *Id.* at 24. It is probable, therefore, that the court of appeals, even if satisfied of the substantive error, concluded that the error was "harmless." This squarely presents the issue now before this Court in *Hasting*.

2. The prosecution's proof in this tax evasion case established two possible sources of non-taxable income: (a) the $1.2 million personal loan which petitioner had reported to his accountant and which had been shown on a net worth statement, and (b) large amounts of cash that were entrusted to petitioner by his clients. This Court has held in *United States v. Massei*, 355 U.S. 595 (1958), and in *Holland v. United States*, 348 U.S. 121 (1951), that unless the prosecution establishes a "likely source" for illegally unreported income, its proof must negate all possible sources of nontaxable income. Under this governing standard, the prosecution failed to carry its burden of proof because no proof whatever was introduced rebutting the two possible nontaxable sources of income.

In this regard, the decision below conflicts with the Second Circuit's ruling in *United States v. Grasso*, 629 F.2d 805 (2d Cir. 1980), and with the Fourth Circuit's decision in *United States v. Bethea*, 537 F.2d 1187 (4th Cir. 1976). In both cases, courts of appeal reversed tax evasion prosecutions based on "net worth" proof when they concluded that the government had failed to negate possible sources of nontaxable income. By that same standard, petitioner was entitled to a judgment of acquittal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the decision of the court of appeals should be vacated, and the case remanded for

clarification of the precise ground on which the court of appeals determined to affirm petitioner's conviction. Alternatively, the petition should be retained on this Court's docket pending decision in *United States v. Hasting*, No. 81-1463, and should then be granted and the case remanded for reconsideration in light of *Hasting*. On the second issue presented in the petition, the writ of certiorari should be granted and the case set for plenary consideration.

Respectfully submitted,

NATHAN LEWIN
(*Counsel of Record*)
R. STAN MORTENSON
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Counsel for Petitioner

OCTOBER 1982